

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

73-2201

73-2201

To be argued by
HAROLD LEE SCHWAB

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LILLIAN WEISS,

Appellant,

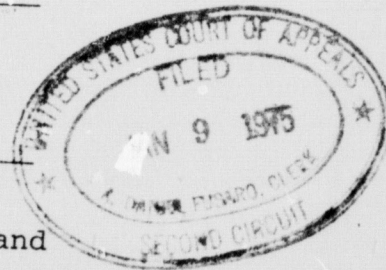
-against-

CHRYSLER MOTORS CORPORATION and
CHRYSLER CORPORATION,

Appellees.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF FOR DEFENDANTS-APPELLEES



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UNITED STATES COURT OF APPEALS
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LILLIAN WEISS

Appellant

- against -

DOCKET NO.73-2201

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APPELLEES' BRIEF

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PRELIMINARY STATEMENT

In this product liability and negligence action, plaintiff Lillian Weiss appeals from a judgment entered in favor of defendants Chrysler Motors Corporation and Chrysler Corporation (hereinafter referred to as Chrysler) upon the unanimous verdict of the jury following a month long trial before the Honorable Thomas P. Griesa, Justice of the United States District Court, Southern District of New York.

Prior to the submission of this case to the jury, plaintiff Weiss discontinued her action against defendant Frederick Elfers.

Plaintiff seeks herein the recovery of damages for personal injuries sustained as the result of a one car accident occasioned by steering failure. The factual issue determined by the jury was whether this steering failure resulted from a mechanical defect in the automobile or by the loss of operation of control by plaintiff Weiss as the operator of the automobile at the time of the occurrence.

Plaintiff contended at trial that the steering failure was caused by the failure of a part of the vehicle known as the Pitman arm stud, asserting that the part failed in two stages. The first stage was occasioned by a product defect, a fatigue fracture, which ultimately

progressed under ordinary driving stress to a second, sudden and complete fracture at the time of the accident. Defendants contended however that the two-stage fracture of this part was occasioned by a series of impacts which followed plaintiff's loss of control due to her extremely high rate of speed on a Connecticut country road whose topographical configuration would cause a vehicle to go out of control at such speed.

After hearing testimony from many factual and expert witnesses, and after observing and studying several hundred exhibits, a jury of twelve citizens, as the exclusive triers of the facts unanimously concluded that plaintiff Weiss had failed to sustain her burden of proving that a mechanical defect caused the steering failure.

COUNTER STATEMENT OF FACTS

The Accident

On November 14, 1964, at approximately 12:30 p.m. plaintiff Lillian Weiss, then sixty years of age, was operating her black 1960 Chrysler Imperial sedan along Route 123 in Connecticut when her vehicle left the travelled portion of the roadway and crashed into a tree (p.138).

On the morning of the occurrence, plaintiff left her home in Manhattan, accompanied by her brother, David Weiss*, her friends, Mr. and Mrs. Herman Maraniss, and her

* David Weiss died as a result of the occurrence.

housekeeper, Miss Modesta Hillary, intending to proceed to her country home in Ridgefield, Connecticut for the weekend (p.134). Mr. Weiss was seated next to Miss Weiss in the front of the car and the others sat in the rear of the car (p.134).

Under direct examination at trial Miss Weiss testified that she was proceeding northerly on Route 123, a two lane highway for north and south traffic, at approximately 40 miles per hour immediately prior to the occurrence. The weather was clear. The roadway was dry and free of grease. There were no cars travelling ahead of or behind the Weiss vehicle (pp.135, 137, 138).

Miss Weiss gave the following account of what occurred while she was driving:

"The steering wheel spun in my hand, there wasn't any connection, apparently, with the steering wheel - -

. . . .

"There wasn't any connection with the steering wheel and the front wheels of the automobile."

. . . .

"The wheel was going to the right and then to the left and I held on to it and tried to correct whatever motion there was but I didn't have any control over the steering and the car veered to the right and slowly started off - - the front wheel first and then the rear right wheel - - off the highway onto the grassy embankment and then I took my foot off - - I decelerated immediately upon feeling of control and I put on the brake, I don't know with how much pressure but the car continued to veer to the right and then the left front wheel followed and the left rear wheel followed and then there was impact with the tree" (pp.139-140).

Miss Weiss indicated that she first experienced difficulty at a point approximately 50-75 feet south of the tree (p.143) when she felt a snap (p.247).

On cross examination, plaintiff admitted that she passed another vehicle on the roadway prior to the accident. When counsel suggested that she in fact had passed two vehicles at one time, plaintiff could not recall if counsel was correct (pp. 203-208). Plaintiff also admitted that after passing this car she encountered a crown in the roadway in the same vicinity where she first experienced difficulty (p.211).

When defendants' counsel questioned Miss Weiss as to whether she and the other passengers had to wait a considerable period of time for Mr. Weiss to return from work prior to departure, she denied it until confronted with an examination before trial wherein she stated that they did so wait (p.198). She also could not recall telling Mr. Maraniss that she was anxious to get to Connecticut so that Mr. Weiss could get some sun. She denied that Mr. Maraniss ever told her that she was going too fast or to take it easy (p.219).

Defendants' counsel also established during cross examination of Miss Weiss that when her vehicle travelled onto the grassy shoulder of the roadway and up an embankment, the right side of the vehicle collided with a tree stump and travelled over a drainage ditch prior

to its final impact with the tree. Miss Weiss indicated at trial that she learned of her vehicle's collision with the stump and ditch following the accident; however, at an examination before trial, she testified that she knew she had hit a drain and a tree stump because she felt the impacts (pp.229-231, 235-239).

Herman Maraniss, a retired business associate and personal friend of the plaintiff, testified that Lillian Weiss was travelling at approximately 60 to 65 miles per hour on Route 123 prior to the accident (p.1074). The posted speed limit on Route 123 was 40 miles per hour. Indeed the speed at which Miss Weiss was travelling caused Mr. Maraniss to make comment on at least two occasions while they were driving on the Merritt Parkway and to also request that she slow down while they were on Route 123 (pp.1067-1068). He also stated that he felt a jarring when the right front wheel went off the roadway but that he did not hear any snap prior thereto (1072).

Mr. Maraniss' testimony concerning the reckless manner in which plaintiff operated her vehicle on the day of the accident was further supported by the testimony of Emmy Lou Salembier and Robert Bunge who were also operating their automobiles on Route 123 on this day (pp.1054, 1059).

Ms. Salembier gave the following account of

what occurred on November 14, 1964 while she was driving north at approximately 45 miles per hour on Route 123 behind another vehicle:

"A. About a miles and a half from my house a black car passed me on a hill. There was another car in front of me so this car had to pass me and the other car going quite fast, and she had to be going fast enough to get back into line before an oncoming car came down the other way. And then the fcar in front of me went off at a street a little further beyond, and I subsequently came upon this car which had hit a tree.

Q. You said this took place about a mile and a half away from your home or somewhere around there?

A. About.

Q. Somewhere in that area?

A. Yes. Maybe not quite.

Q. How long was it from the time that the black car passed you, as you have described it, until the time you came upon it at at the tree?

A. Well, two or three minutes. I really can't be specific. As long as it would have taken me to go that mile and a third.

Q. How fast were you going at the time when this black car passed you?

A. About 45."

(p.5).

Mr. Bunge, who was proceeding south on the same route at the time, testified:

"A. My wife and I were going into town in a southerly direction and we noticed a car coming in our direction travelling

north that seemed to go back and forth on the road and we were apprehensive because this could come on our side or stay on the other side and then it ended up on the easterly side hitting a tree.

Q. Incidentally, Mr. Bunge, besides driving an automobile, do you have any experience dealing with motions and turns and things like that from any other occupation or job that you had in the old days?

A. I was a naval pilot.

Q. That's World War II?

A. World War II.

Q. You said you saw this car go back and forth. Can you describe it for us a little better or more precisely in terms of your observations?

A. It appeared to me to go into the gutter and kick up some dust and then come back into the middle of the road and then go to the gutter and then back to the middle of the road, and then back to the gutter into the tree." (p. 19)

Portions of the motor vehicle accident report of the New Canaan police were introduced into evidence on behalf of defendants Chrysler. They further support defendants' trial contentions that the accident was caused by plaintiff's loss of control. The police report provides in pertinent part as follows:

"The car involved showed extensive damage to the front. The windshield was broken outwards, and here was found hair and blood in the broken glass. The front seat was forward almost against the dashboard. This seat had to be jacked back with a hydraulic jack before the occupants could be removed properly. The tires were checked and the right front was

found to be flat at this time the other three were inflated properly.

"The accident scene was investigated and all evidence was marked and recorded. The investigation revealed this vehicle was travelling north on Smith Ridge Road when it left the highway to the right side going up onto the embankment which is dirt and grass. Where the vehicle first went on the embankment it is almost level with the roadway, but as it goes north it raises in grade also pitches back east towards the stone wall.

This vehicle when it left the highway left a wheel imprint and from the start to the tree it traveled on this embankment for a distance of 69 feet. During the time and distance this vehicle travelled over a tree stump level with the ground, over a drainage ditch 4 feet wide and 2 feet deep. At the tree stump it was visible to see where the undercarriage of the car dragged over. The car in this position was tilted on an angle towards the roadway. There were no signs of any marks on the highway previous to this car leaving it." (EMPHASIS ADDED) (Defendants' Exhibit A)

Modesta Hillary, who flew up from her home in Jamaica to appear at trial on behalf of Chrysler, testified that Lillian Weiss was speeding and passing other cars throughout the course of the trip, and more importantly, on Route 123. She confirmed the veracity of Mr. Maraniss' testimony concerning his repeated complaint to her about her speed and his instruction to her to slow down.

Miss Hillary also advised that she always tried to avoid being a passenger in Miss Weiss' car because as Miss Weiss often stated and indeed even admitted at trial,

she drove "like a man". It is submitted that this testimony was devastating to plaintiff's case.

Thus, the testimony and records of the lay witnesses in the case at bar provide overwhelming support not only for Chrysler's contentions that this accident was caused by driver error, but also for defendants' impact theory of fracture. How can plaintiff's counsel claim that he was surprised by Chrysler's defense when plaintiff testified to a series of impacts and the motor vehicle accident report of the New Canaan police department traces the path of this vehicle and its collision with the tree stump, the drainage ditch and finally, the tree.

Expert Testimony

The thrust of plaintiff's complaint on this appeal is that she was deprived of notice of Chrysler's tree-stump theory of impact prior to trial and was unaware of it throughout her case in chief, thus precluding her from attempting to negate this theory on her direct case. We submit that plaintiff deliberately misleads this Court in this complaint because while Chrysler consistently has claimed throughout the course of this litigation that the two-stage fracture of the Pitman stud was impact-induced, at no time did the defense adopt a specific theory as to which of the vehicle's series of impacts precipitated the failure of this stud. Indeed, defendants' experts disagreed

as to which of the vehicle's collisions induced these fractures. We submit however that determination of which of the vehicle's impacts on the day of the accident induced the fractures is irrelevant to the issues presented by this case. The key issue, determined by the jury in favor of defendants, was whether the Pitman stud failed on the roadway as the result of a product defect, causing steering failure or whether steering failure was occasioned by plaintiff's driving error. Defendants successfully demonstrated at trial that the two-stage fracture of the stud was induced on the day of the accident through a series of violent and severe impacts after the vehicle had left the roadway because of plaintiff's loss of control.

Even if we assume arguendo the accuracy of plaintiff's charge that defendants adopted a tree stump impact theory at trial, plaintiff again misleads this Court by claiming surprise. A review of the expert testimony offered by plaintiff on her direct case discloses (1) attempts by plaintiff to negate such a theory and (2) defendants' development of its impact theories during cross-examination of plaintiff's experts.

A review of the record further reveals plaintiff's efforts on redirect to explain and thus rebut the damaging testimony elicited from her experts during cross-

examination.

It is further submitted that a review of the record discloses that the Court did not restrict plaintiff on redirect in her attempts to rehabilitate her experts, contrary to her assertions on this appeal. (See Appellant's Brief, p. 48 and pp. 520, 523)

Plaintiff's case in chief took approximately seventeen days of trial to complete, during which time defendants' counsel, with the aid of plaintiff's experts, laid out its defense of impact induced failure of the stud for the jury and the Court. We submit that it is truly amazing that plaintiff's counsel appears to be the only trial participant to have been unaware of the Chrysler defense.

Plaintiff's trial counsel was present throughout the entire State Court proceedings where Messrs. Mosely, Gordon and O'Connell testified on behalf of Lillian Weiss. While plaintiff argues that Chrysler ingeniously developed a new theory at the last minute on defendants' case, thus precluding the introduction of any proof on plaintiff's direct case to negate Chrysler's unanticipated defense, we submit that the prior State Court trial testimony of Mr. Mosely, which occurred in 1968, as quoted below, exposes the specious nature of plaintiff's claim of surprise.

"Q. All right, sir. Now, proceeding inboard from the right front wheel, restricting ourself to the steering linkage, did you notice any damaged linkages on the right side of the car?

A. The connection of the tie rod to the intermediate rod was in failure. The component which goes through the intermediate rod was in place, but the connecting component itself was in failure.

THE COURT: Was in failure?

THE WITNESS: Yes."

.

"Q. And from your studies do you have any opinion as to what caused that breakage?

A. I felt that that was an extension failure due to having a tremendous force placed upon the steering system. I believe that it happened at the time the front wheel assembly contacted the stump.

Q. It was a result of impact?

A. I believe that to be collision damage with impact with the stump.

Q. Was this linkage bent in any way?

A. It's obviously bent. You can see it in the photograph." (pp. 372-373)

.

"Q. In other words, is this socked pulled apart from its mating part?

A. That's essentially what happened, yes.

Q. And you think that happened when the car

hit the stump before the car hit the tree?

A. I do." (p. 374)

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"THE COURT: Now, in your opinion would the bending of that right section that you've just referred to, have any effect upon the pitman bolt that we were talking about?

THE WITNESS: At this point there was no physical connection between any of this part of the system and the pitman bolt.

THE COURT: Well, would a bending or a collision sufficient to bend that particular section of the front linkage, would that have any effect, produce any stress or strain or shock upon the pitman bolt that we've been talking about?

THE WITNESS: If the pitman bolt were connected to the pitman arm, at this time --

THE COURT: Well, if it were in one piece, assuming that it were in one piece.

THE WITNESS: If it were, obviously it would have some effect on --" (p. 378)

.

"Q. Now, if this right wheel were turned violently to the right and there was a connection between the pitman arm and the center link, what would happen to forces exhibited on that bolt?

A. Well, they would certainly be increased and during a short period of time, very rapidly." (pp. 383-384)

Mr. O'Connell's testimony during the prior litigation provides additional proof of the falsity of plaintiff's assertions of prejudice:

"Q. Now, Mr. O'Connell, if you assume that a Chrysler Imperial car is off the road in the rough area, in the grass going over a drainage ditch and then hitting a stump, and then going into a tree where there is evidence that the car was moving at sixty or sixty-five miles an hour, and there other evidence that there is no slowing down of that car throughout its travel, what could that do to the bolt? (p. 528)

A. Could have done, all right. Now, we come along to what it could have done. It could have affected the bolt if the forces were applied and transmitted to the bolt, and it could have left the bolt as free as the birds in the air if the forces were not transmitted to the bolt." (p. 529)

We respectfully contend that the prior testimony, briefly quoted above, conclusively destroys any and all of plaintiff's complaints regarding concealment of defense strategy and proof prior to the commencement of Chrysler's direct case.

More, importantly, this Court is requested to note that Chrysler participated in the total settlement of the Maraniss and Hillary actions to the extent that it contributed \$17,000 out of the total settlement of \$70,000. The balance was paid by the Aetna Casualty Insurance Company as insurers for defendant Lillian Weiss. The action by the

Estate of David Weiss against defendants Chrysler and Lillian Weiss resulted in the dismissal of plaintiff's complaint and the cross-complaint of defendant Lillian Weiss and Weiss Brothers Stores as against defendant Chrysler.

The findings of the Trial Court in favor of Chrysler in the prior litigation and the unanimous verdict of the jury in the case at bar where virtually identical expert testimony was offered on behalf of Miss Weiss as to product defect in both, unquestionably establishes the unmeritorious nature of plaintiff's contentions. Indeed, the overwhelming weight of the credible evidence practically mandated a directed verdict for Chrysler in the case at bar.

Plaintiff's Expert Testimony

Alfred Mosely:

On her direct case, plaintiff called Alfred Mosely to testify on her behalf. Mr. Mosely explained that he was a cadologist and that his field was cadology, the scientific study of accidents. (p. 260) On cross-examination, he admitted that he made up the word "cadology" and thus, gave himself the title of "cadologist". (pp. 361-362)

Mr. Mosely visited and inspected the accident site approximately ten days after the occurrence where he

studied the steering system of the car and allegedly viewed tire marks on both the paved portion of the roadway and the embankment. (pp. 280, 313)

Upon viewing the accident scene, Mr. Mosely concluded that the Weiss vehicle collided with a tree stump and drainage ditch before its final impact with the tree and he testified accordingly on plaintiff's direct case. (p. 277) Upon examining the steering system of the automobile, he observed that the Pitman arm stud had been fractured and that the tie rod stud connecting the left tie rod to the center link had been pried out of its housing. (p. 292) According to plaintiff's expert, the source of this deformation to the wheel was the vehicle's "violent and severe impact with the tree stump". (pp. 417-418)

During cross-examination, Mr. Mosely stated that the sudden motion of the right front wheel in contacting the stump exerted a pull on the steering link which separated the tie rod fitting for the left front wheel. (p. 422) The forces generated at the right front wheel therefore admittedly were of such magnitude as to go across the entire linkage set up and still pull the left tie rod stud from its encased housing. He specifically stated that the stud which connected the left front tie rod failed as a consequence of the violent and severe impact with the tree stump (p. 425) He further explained that the same forces generated as a

result of the vehicle's impact with the tree stump which caused failure of the left front tie rod stud were also generated into the Pitman stud and Pitman arm. (pp. 436-438) Indeed, plaintiff's contentions notwithstanding, Mr. Mosely even testified that these forces were sufficient to cause a failure of the Pitman stud:

"Q. ...If the forces that are generated throughout this linkage are sufficient to separate the tie rod stud, would these sources be sufficient to cause a failure to the Pitman stud?

A. I would say yes, but I would like to qualify what I mean by this, if I may."
(pp. 438-439)

This testimony was delivered during cross-examination on plaintiff's direct case. Furthermore, during the direct examination of Mr. Mosely, plaintiff's counsel tried to establish evidence of steering failure prior to impact with the tree stump. (pp. 96, 304) The record with respect to the foregoing belies plaintiff's claim on this appeal that she was surprised with defendants' tree-stump impact theory for the first time on defendants' direct case. (Appellant's Brief, pp. 3, 44-45)

Mr. Mosely also testified that his inspection of two tiremarks in the roadway which commenced at points approximately 50 and 55 feet south of the point of final impact supported his contentions that plaintiff's vehicle was in steering failure prior to its leaving the roadway.* The

*Defendants, of course, do not contend that this vehicle was not in steering failure prior to leaving the roadway. They do contend that the source of the steering failure was plaintiff's loss of control as opposed to a product defect.

steering failure was occasioned by the fracture of the Pitman stud which caused a breakdown of the connection between the steering wheel and the steering system (p. 327), causing loss of control.

Parenthetically, it is to be noted that Mr. Mosely admitted that Officer Ready, a member of the New Canaan, Connecticut Police Department who was at the scene of the accident immediately following the occurrence and who also swept-up the roadway on said day, advised Mr. Mosely that the marks which he observed, studied and then testified about in the case at bar were not on the roadway following the occurrence. (pp. 412-413)

The inner tire mark which commenced at a point 55 feet south of the tree was described as initially thin in width which progressively and then suddenly became wider. According to plaintiff's expert, the source of this mark was the left front wheel of plaintiff's car. The outer mark which was allegedly made by the left rear tire was described as thin, linear, running parallel to the edge of the roadway with a turn eastward towards the pavement. (pp. 281, 283-284, 290)

Although the testimony of this report by Mr. Mosely was refuted by Sylvester Mazur, common sense alone demonstrates the fallacy in the opinion of plaintiff's "cadologist". Assuming arguendo that the Pitman arm stud

could fracture in normal automobile operation and that this would result in erratic movement of the steering linkage, it is apparent that both front tires would exhibit the same erratic behavior. The linkage between the left and right wheels remains intact even if there is no Pitman stud. If a progressively widening tire mark was made by the left tire due to angulation of the left wheel, an identical mark would be left by the right tire, provided, in the first instance, that there was a separation of the Pitman stud. The absence of two identical "fingerprints" demonstrates conclusively that the marks in question were not made as a consequence of a Pitman stud failure prior to the vehicle leaving the roadway.

Mr. Mosely produced a tire which he claimed was the left front tire of the Weiss vehicle which he had removed from the automobile and retained for trial. It is to be noted that although Mr. Mosely testified on behalf of plaintiff in State Court litigation arising out of the same occurrence, wherein she was a defendant, he never indicated during his prior testimony that he had retained the tire. Additionally, a photograph identified by Mr. Mosely to depict the left rear tire was identified as a photo of the left front tire during his prior testimony. (pp. 465-478)

Mr. Mosely exhibited the left front tire to the jury and explained that there was extraordinary erosion of

the sidewall causing the removal of raised lettering and marks on the tire. He stated:

"Let me indicate with my finger here, the residues of the name Goodyear, and you can see how much of it has been removed... The significance of this, as I see it, is that the tire is in this position -- let me make the tire go north-- if the vehicle is rolling directly north in the lane parallel to the center line, it will be in this position. After the steering failure occurred, the wheel started to turn to the right, and this accounts for the widening mark. When you make a right turn, which is a greater degree than you should, the whole tire, and the car itself, tries to lean to the outside, so you get over to the shoulder of the tread.

"The tire starts to skid out in this fashion towards you, and as it does that it starts to erode the edge of the shoulder of the tread, as I indicate here.

"Now what has happened in this one is that the degree of angular change of the wheel from a straight line is so severe that the vehicle is trying to go both forward and roll over, with the result that the tire is rolling underneath and the sidewall is on the surface of the street..." (pp. 307-308)

According to this "cadologist", these tire marks represent a fingerprint of steering failure while the vehicle was in transit. (p. 339)

Mr. Mosely had to admit on cross-examination that the erosion shown on the left front tire could also be attributed to contact or scraping against curbs. This admission came after he was confronted with another tire

obtained by defendants' counsel from a garage which exhibited the same type of erosion as the tire allegedly retained by Mr. Mosely (pp. 392-400)

During cross-examination, it was established that the sudden widening of the left front tire mark occurred in the approximate vicinity of the tree stump. (pp. 369-373) On redirect, plaintiff's counsel, who now claims that he was surprised to learn of defendants' tree stump impact theory at the time of defendants' case, attempted to establish that the sudden widening occurred at a point in the roadway south of the location of the tree stump. (pp. 281-283)

Mr. Mosely indicated that south of the final impact tree there is an estate driveway which enters onto the roadway in such a manner as to cause a significant hump formation across the road and perpendicular to the center crown. (p. 377) Evidence at the trial by way of official police records established that other vehicles had been involved in similar one car accidents, off the road and striking trees, in this immediate vicinity (Exhibits BY, BZ) This hump and crown condition is unusual according to Mosely. He explained that driving over such a hump causes a weight transfer to the left side of the vehicle as the right wheels are lifted, causing the vehicle to bounce. As the speed of the vehicle increases, so does

the weight transfer to the left. This type of terrain could cause a driver proceeding at approximately 60 miles per hour to lose control over the operation of her vehicle. (pp. 378-386) The roadway condition and its possible effect was reported to plaintiff's counsel more than eight years ago by Mr. Mosely. Indeed, in this respect Mr. Mosely was to be believed. Lillian Weiss, travelling at approximately 65 miles per hour in a 40 mile per hour zone, to make up for lost time, lost control when she encountered this topographical configuration which did not exist previously on Route 123.

It is also to be noted that Mr. Mosely's testimony contradicted that of Miss Weiss in an important respect. As previously discussed, Miss Weiss indicated that as she was driving, the steering wheel spun quickly in her hands. At another point in her testimony, she said she felt a snap in the steering wheel. (p. 247) Mr. Mosely testified that even if a Pitman arm fails while a driver is proceeding down a straight road, she will not notice anything unusual unless she attempts to turn the wheel. Furthermore, during his testimony at the State Court trial discussed above, he stated:

"THE COURT: Can you just by feeling the wheel and turning it, can you tell whether the system is intact? Can you tell?

THE WITNESS: You have to watch and see if

you get a result. It's not a feeling measurement. This is a visual measurement." (pp. 456-457)

Robert Gordon:

Mr. Mosely removed the parts of the vehicle comprising the steering system which were delivered to Robert Gordon, a metallurgist from Yale University, who examined the parts to determine if any were defective prior to this accident. (pp. 539-542) In examining the parts, he observed that the Pitman arm stud had been broken and the steering linkage was bent. (pp. 586-587) The fracture surface was covered with flaky, reddish-brown rust in evidence over the whole surface. On part of the fracture surface, however, he discovered a dark blue oxide which Dr. Gordon interpreted as evidence of a pre-existing crack in the pin which was present a considerable amount of time prior to the accident. (pp. 544-545)

Dr. Gordon attributed the sudden steering failure experienced by plaintiff to the final failure of the Pitman arm stud which had been weakened over a period of time by the growth of one or two fatigue fractures. (p. 582) Although fatigue fractures may arise from manufacturing defects such as are caused by tool marks or irregularity or inhomogeneity in the material, there was no proof by examination or testing of the stud that such was the

case here. Alternatively, such a crack could have been initiated as the result of the previous collision involving the front end of the vehicle. (pp. 584-585) These causes are not necessarily mutually exclusive of each other.

On cross-examination, Dr. Gordon admitted that after removing all the grease from the stud surfaces, the only test conducted by him to determine the presence of this dark blue oxide was a visual one. (p. 610) Although he indicated that the presence of this blue oxide was the primary evidence forming the basis for his conclusion of a pre-existing fatigue fracture, he used no chemical or x-ray means to confirm his interpretation. (pp. 610-613)

Appellant, who argues so vigorously about the significance of dark blue oxide, fails to apprise the Court that there were substantial questions of fact as to whether (1) this condition did in fact exist, and (2) if it did, whether it was caused for other reasons. Gregory and Turnbull did not observe such condition when they were given a part of the stud to examine in 1970 and the color photographs taken at that time do not reflect same. Even the color photographs taken by Gordon in December, 1960 do not reflect its existence, and Gordon was required to rationalize this inconsistency by suggesting that you cannot

take a color picture which would depict this color differentiation. (pp. 24, 552, et seq, Exhibit 169) Accordingly, the credibility of Gordon was a matter of substantial issue in this case, albeit the fact that he was a college professor who testified part-time in this and other civil cases, and this was further highlighted by testimony in the case presented by the defense regarding the loss of the actual stud itself while in the apparent possession of Gordon at Yale so that it could not be presented at this trial by the defense and exhibited to the jury. Further, expert testimony throughout the case established that dark blue oxide, if it did exist, can be caused for various different reasons unrelated to fatigue problems, such as by oil or grease getting onto the part, which was easily possible as a result of the accident, during removal of the linkage from the car, removal of the stud, or under other conditions where one obviously would expect to encounter oil or grease. (pp. 1136, 1137, 1147)

In addition, Dr. Gordon testified that he observed the presence of claim shell markings on the fracture surface which are characteristic of fatigue fractures. (p. 566) In Dr. Gordon's notes which were produced at trial, there was a sketch of the fracture surface with the legend, "fatigue marks?". These markings do not show up in any of the photographs taken by Dr. Gordon. Furthermore,

in his report to plaintiff's counsel, he indicated that "there is only a trace of the shell markings generally found in fatigue cracks," although initially during cross-examination, Dr. Gordon asserted that there was more than a trace. (pp. 612-615)

Examination of the stud did not reveal any evidence of a tool mark and the design of the stud was suitable for its application, although Dr. Gordon claimed at trial that he did not compare the stud to the manufacturer's specifications or evaluate the correctness of the design. (pp. 608-609) During the trial of the State Court litigation, Dr. Gordon advised the Court:

"The point I wanted to make was that the choice of material and the way in which the material was heat treated would be appropriate to the service in which this part was used." (p. 609)

Dr. Gordon had also issued a written report wherein he stated that he could find no evidence of inherent metallurgical defect. (p. 621)

The Weiss vehicle was involved in another front end collision in August, 1964 with defendant Elfers' vehicle. Dr. Gordon testified that this impact could have been the cause of the development of a fatigue fracture in the area of a small pre-existing product defect which he claims to have observed covered with blue oxide. He further testified that fatigue fractures are very difficult to detect.

Detection requires highly specialized, expensive equipment which most service stations, etc. do not maintain.

(pp. 629-630)

Stephen Richard:

Plaintiff then called Stephen Richard, an automobile repair man, to testify that the force generated in the Elfers accident was not of a sufficient nature to cause a fracture of the Pitman stud, since the force required would have also caused a bending of the steering link, which was not evident in the Weiss vehicle following the August, 1964 accident. (pp. 671-673) It is significant that Mr. Richard, who was produced on plaintiff's case in chief and permitted to testify as an expert as to analytical and metallurgical matters over defendants' objection, and never named or cited in any of plaintiff's interrogatories. Furthermore, Stephen Richard testified even though his name was not included in a pre-trial stipulation which provided that plaintiff would only call Mr. Mosely, Dr. O'Connell and Dr. Gordon as experts at trial. (pp. 645-646)

Additionally, on cross-examination, defendants' counsel inquired whether Mr. Richard knew the amount of force necessary to shear a Pitman stud. Mr. Richard did not know. (p. 692) Mr. Richard also did not know that it requires more force to pull out the tie rod stud than it does to fracture

the Pitman stud. (p. 693) Yet, he testified that he would expect a bending or collapse of the steering link upon fracture of the Pitman stud but not upon the pulling out of the tie rod stud.

On cross-examination, after showing Mr. Richard several photos of the damage to the right wheel flange, Mr. Richard testified that based on the damage to the right wheel rim, he would expect to find deformation of the right tie rod, to the steering link, and the pulling out of the left tie rod stud because of the type of impact force exhibited. Significantly, he also testified that "anything is possible in an accident of this nature." (pp. 687-689)

Appellant placed great reliance upon the fact that Richard never saw a fractured Pitman arm stud. It is understandable that he never did. He admitted on cross-examination that in his type of business he never does body and repair work on cars that have been totalled out. (p. 699)

Defendants' Expert Testimony:

Sylvester Mazur:

Sylvester Mazur was the ultimate expert who could be produced by any party regarding Pitman studs, steering linkages and vehicle behavior relating to steering. (pp. 700-703)

Although he did not possess a formal degree in engineering, apparently considered vital by appellant, his career of approximately three decades related to the design and testing of steering systems. (pp. 700-704) He was the product engineer for TRW, Inc. who designed the ball joint suspension system and manufacturers steering linkages for automobiles including the Weiss vehicle. Because of his expertise in this area, Chrysler had produced Mr. Mazur for deposition on February 17, 1970 by counsel for the appellant who now argues that the plaintiff was unable to know in advance what the prospective testimony of Mr. Mazur would be.

Accordingly, any item of fact or opinion elicited from Mr. Mazur at the trial about which appellant so vigorously protests ignorance could have been established at the deposition of Mr. Mazur by proper questioning, if indeed a litigant is entitled in the first instance to know the entire testimony of an expert even under today's rules.

Defendants' expert testified that under regular road driving conditions, the maximum force which can be applied to the steering linkage, and more importantly, to the Pitman stud, is 1500 pounds. Application of this degree of force can be achieved by parking a vehicle against a curb so that the right wheels are touching it, applying the brakes, and then turning the steering wheel all the way

to the left. With this test, you have an attempt to steer where the wheels will not permit same because they are against the curb and thus cannot turn. (pp. 739-742).

The application of such a degree of force represents an extreme situation; in fact, the maximum load of force applied to the steering system as the result of driving on a country road such as Route 123 even with its four inch crown and a driveway hump is only 200 pounds. (p. 743)

Upon viewing photographs of the damage sustained by the Weiss vehicle as a result of the Elfers accident in August, 1964, Mr. Mazur testified that between 100 pounds to 1500 pounds of load were transmitted through the steering linkage. On February 24, 1973, at the TRW laboratories, a complete half of a Pitman stud was intentionally cracked, the stud was inserted into a steering system and a 1500 pound load was applied to the steering link under tension compressing the stud in and out. 19,000 cycles of compression were required before the partially fractured stud went into complete failure. Mr. Mazur explained that 19,000 such cycles are the equivalent of 600,000 miles of travel. (pp. 751-758)

Thus, Mr. Mazur concluded, in response to Dr. Gordon's testimony, that if the Pitman stud had developed a fatigue fracture as a result of the Elfers accident, the TRW test studies showed that even with the application of 1500 pounds of force, 600,000 miles of travel are required to cause a

complete fracture.

On the basis of force and poundage tests conducted by TRW, Inc. of a Pitman stud, Mr. Mazur testified that 4,560 pounds of force* must be applied to fail or bend a Pitman stud. (pp. 745-746) More importantly, TRW test studies reveal that 4,800 pounds to 10,360 pounds of force must be applied to the steering system in order to pry or pull out a tie rod stud. (pp. 765-766)

Defendants' counsel then pursued the following line of inquiry:

"Q. There was some reference made, Mr. Mazur, to the distinction -- and this was through, I think, Mr. Richer -- or the fact that the Pitman stud was found to be fractured whereas the ball stud was pulled out and in that context, let me ask you this: Based upon the design of these two different types of stud, is one stud an easier one to pull out or pry out than the other?

A. Yes.

Q. Which one?

A. The tie rod socket.

Q. That is the ball stud, is that right?

A. Yes, the ball stud. (pp. 767)

*It is to be emphasized that the reference by Mr. Mazur to pounds (lbs.) of force is totally separate and distinguishable from the reference in appellant's brief to prospective testimony by Professor Radar of pounds of pressure per square inch (psi). Counsel for appellant failed to note in his brief this significant distinction although he made reference to the 4,560 pounds of Mazur and the 48,000 psi of Radar. These are two completely different means of measurement.

"Q. Could you explain to us and show to us on these exhibits, AQ and AP in evidence the reason for that, please?

A. When a steering linkage is damaged and parts are bent as were described to me this stud being a ball stud which will move over to its extreme angular travel, to here some place and when the parts continue to bend it can no longer do anything else but to pry itself right center link or the steering link socket there is metal enclosed in right at the top here and there is metal enclosed in here. There is not a ball there. When the forces are sent into this socket they tend first to shear it this way. There isn't that much distance here to bend so the bend, if any, would be of a very minor nature.

Q. Is the head of the Pitman stud significant with regard to it not coming out or being pried out?

A. Yes. The shape of it is such that it doesn't lend itself to pry out easily. It is made to give rotational motion only and not rocking motion." (pp. 768-769)

THE COURT: The combination of shear and tension would be a bend if the Pitman arm would be going to the left or the steering link would be going to the left in the photograph, do you see that, Mr. Mazur? It would have a shearing force pushing the pin, right?

THE WITNESS: Yes.

THE COURT: You say it might also have a tension force to pull the pin out?

THE WITNESS: Yes.

THE COURT: Wouldn't the total of that be to kind bend?

THE WITNESS: It depends on the speed of application. If done rapidly like that you couldn't see it bend. If it is done slowly it would be like hitting."
(pp. 769-770)

Mr. Mazur concluded that the forces exerted on the steering linkage on November 14, 1964 which resulted in a bent, right hand tie rod, a bent steering link, a separation of the left tie rod ball stud, and the deformation of the right wheel flange were of a sufficient magnitude to fracture a completely sound Pitman stud.
(pp. 766-767) Thus, the vehicle's impact with the tree stump while proceeding at a speed of approximately sixty miles per hour generated sufficient force to fracture the Pitman stud. He also indicated that its impact with the drainage ditch generated sufficient force to fracture this stud, as did its impact with the tree. (pp. 771-776)

It is clear from the foregoing summary of Mr. Mazur's testimony that defendants did not specifically adopt the tree stump impact theory. Indeed, all defendants did was to develop that any of the various collisions which occurred on the day of the accident could have induced the

initial fracture.

In addition, as will be more fully discussed in Point I of this brief, plaintiff's counsel never objected to introduction of the results of the TRW Pitman stud test, on the grounds of surprise or failure to include same in Chrysler's answers to plaintiff's interrogatories. (pp. 865-867); p. 929) The failure to make such objection at trial precludes plaintiff's claim of prejudice now.

Thomas Turnbull:

Thomas Turnbull, senior scientist of Ernest F. Fullam, Inc., specialist in the field of microscopy, which is the principal method for analyzing failures in metal, studied sections of the fractured Pitman stud at the request of defendants. (pp. 949-953; pp. 954-956) Upon visual and light microscopic examination, Mr. Turnbull observed an abrupt, sharp, choppy crack through the case-hardened rim which surrounds the Pitman stud. (p. 962) This effect could only be produced through the application of abrupt violent force to the stud. (pp. 963) This type of fracture is distinguishable from a fatigue fracture which gradually progresses and produces a flat, smooth, pounded edge. (p. 964)

A cup and cone effect was also observed on the

fracture surface which Mr. Turnbull described as a ball and socket type arrangement which indicates a fracture caused by the application of a tensile load pulling the specimen apart. (p. 961)

He also found a clear arrest point across the diameter of the specimen which indicates a two stage mechanism for total fracture. (p. 965) Electron microscopic examination revealed that the edges around the arrest point or line were choppy, indicating that they were pulled or torn apart. (p. 973).

Mr. Turnbull also studied the Pitman stud which was deliberately fractured and tested by TRW, Inc. This stud disclosed all the classic characteristics of a fatigue fracture such as clam shell markings, a flattened, smooth edge to the case-hardened area. The clam shell markings develop each time the fatigue fracture opens and closes, causing the development of arrest lines. The case edge lacks the sharp crisp edges found in the stud involved in the occurrence herein. (pp. 997-1000)

Mr. Turnbull concluded:

"Q. ...Do you have an opinion with a reasonable degree of certainty in this particular area as to the period of time between the beginning of the break and when it was all over with?

A. I believe that it was almost instantaneous. The initial violent impact and then a continuing force that pulled it out..." (P. 1016)

Although Mr. Turnbull also studied the photographs taken by plaintiff's expert, Dr. Gordon, specifically Exhibit 171, he indicated that it didn't compare with what he observed and though that he had been given a different sample. (p. 989) The photograph did not reveal the presence of a dark blue oxide. (p. 1041)

While plaintiff claims herein that she was severely limited in her right of cross-examination of Mr. Turnbull by the Trial Court's refusal to permit her to cross-examine Turnbull with the deposition of Donald Gregory, Chrysler's metallurgist, the record reveals that Mr. Turnbull was extensively questioned as to notes made by Mr. Gregory of Mr. Turnbull's observations. Mr. Gregory as he initially looked at the stud through an ordinary microscope. (pp. 119-120) Indeed, plaintiff's counsel seized upon a note which states "Part was running cracked" (rounded edge) in an attempt to support its claim that the fracture surface evidenced fatigue. Mr. Turnbull denied making such a statement or observation and part was running cracked they should have been able to find evidence of a rounded edge which was not present on the fracture surfaces presented. (pp. 1050-1051) Again, it is apparent that plaintiff's claims of prejudicial error are

inaccurate and untrue since plaintiff was permitted to read Mr. Gregory's entire deposition on rebuttal, and to cross-examine Mr. Turnbull with respect to Mr. Gregory's notes.

It should also be noted that while plaintiff claims that she was severely prejudiced by defendants' introduction of proof based on test studies regarding the forces necessary to fracture a Pitman stud and bitterly complained that Mr. Mazur did not personally conduct these tests and was thus unqualified to testify about same, the record discloses that defendants' counsel offered to produce another TRW, Inc. employee, Mr. Donald Parrott, who did actually conduct these tests, on defendants' direct case if plaintiff's counsel so desired. This offer was made while Mr. Mazur was on the stand. Although the Court instructed plaintiff that she had to advise defendants of her intention with a day, plaintiff's counsel ignored defendants' gracious offer and the Court's direction. Indeed, the record discloses that although plaintiff continued to ignore this offer until almost the close of Mr. Turnbull's testimony, defendants nevertheless produced Parrott regardless of the fact that plaintiff failed to give timely notice. It is to be noted that the appellant's brief fails to indicate that Mr. Parrott appeared and testified on plaintiff's rebuttal case. (pp. 1001-1004)

Isaac Stewart:

Isaac Stewart, consulting engineer, was called as an expert witness on behalf of defenants. He was originally consulted by the plaintiffs in the State Court actions and rendered a report to them based upon his analysis of the findings included in the reports of the Weiss experts, Mosely and Gordon. In this report, which is dated December 3, 1966, the initial crack observed by Mr. Gordon was rejected as the source of steering failure by Mr. Stewart because even assuming its existence prior to the day of the accident, operation of the vehicle along Route 123, a straight road, intoruces a very small load on the stud, a load incapable of producing sufficient stress to cause the stud to fracture. He concluded, therefore, that the damage to the steering system, as noted by Mr. Mosely, shows that the impact force of hitting the tree was probably sufficient to fracture the residual area of the stud. He also stated that since no damage to the steering occurred in the prior accident, no inspection was called for which could have disclosed the presence of the crack.

Based on the foregoing report, plaintiff is hard-pressed to convincingly claim that she was unaware of defendants' theory that the fracture of the Pitman stud did not occur until the vehicle had left the roadway. Nor can plaintiff convincingly claim that she was unaware of defendants'

theory that the damage to the stud was impact-induced following plaintiff's loss of control. Mr. Stewart rendered this opinion made known to trial counsel for appellant herein years before this trial in a case on behalf of plaintiffs who were suing both Chrysler and Lillian Weiss.

At trial, Mr. Stewart testified that a Pitman stud which had a crack in it that covers some 44% of the original, functions with the same strength and load bearing capacity of a smaller pin of .456 of an inch diameter without such crack or defect. In accordance with his earlier report, he concluded that the loads introduced into a cracked stud as the result of driving on roads like Route 123 were insufficient to cause sufficient stress as to produce a fracture of the stud.

He described the distinguishing characteristics of fatigue fractures and impact fractures and concluded that the failure of the Pitman stud in the case at bar was caused by impact with the tree. (1169-1171)

Mr. Stewart's trial testimony further refutes plaintiff's contention that defendants adopted a specific theory as to which of the vehicle's many impacts on the day of the accident caused the failure of the Pitman stud.

More importantly, during Mr. Stewart's direct examination, he was shown slides and photographs prepared

by plaintiff's expert and Mosely. As a result, Stewart established that the arm itself was also fractured during the occurrence. Once again, plaintiff's experts who observed and studied the actual fracture of this vehicle, failed to note or to admit the existence of a crack in the Pitman arm.

It is submitted that the reasons for their failure in this regard are indicative of plaintiff's deliberate attempts, but careless efforts, at concealment in this case.

Accordingly, as of the time that the defense concluded its expert testimony on rebuttal, the evidence had established at the very least that the forces generated during the course of one or more of the impacts during the happening of the accident (a feature peculiar to this one car occurrence) had resulted in not only damage to the right wheel flange, but also deformation of the two tie rods, a separation of the left tie rod from its encased housing, and a crack on the Pitman arm, a substantial member in and of itself.

Whether there was deformation to other component parts such as the right tie rod stud is unknown due to the fact that the steering linkage was thrown out by a representative of the plaintiff before the State Court trial.

Clearly, forces of such magnitude also fractured the Pitman stud and any verdict in favor of the plaintiff

would have been contrary to the overwhelming weight of the credible evidence.

Plaintiff's Rebuttal

Dennis Radar, another Ph.D. from Yale University, was called on rebuttal by plaintiff and testified notwithstanding plaintiff's pre-trial stipulation to call only Mosely, Gordon and O'Connell as experts on the engineering and liability aspects of her claim.

Prior to commencement of his testimony, the Court properly instructed counsel that Mr. Radar could testify only to refute new points raised by defendants.

Mr. Radar gave extensive testimony relating to the characteristics of fatigue fractures as opposed to impact induced fractures in rebuttal to defendants' experts. (1006-1008) He contradicted Mr. Stewart's testimony asserting that a cracked Pitman stud cannot sustain the same load as a smaller stud of the same dimensions. (1003-1005) However, he did support Mr. Stewart's testimony in another respect.

Significantly, Mr. Radar agreed with Stewart's testimony to the effect that if a force comes in through the right tie rod arm, said force would be transmitted and carried by the Pitman stud even if there were a failure of

the idler arm located on the right side of the vehicle.
(pp. 1103-1106)

Plaintiff claims that she was prevented from introducing proper rebuttal evidence because of an arbitrary and prejudicial ruling of the Court below. Plaintiff erroneously alleges that the rejected proof was necessary to rebut Mazur's opinion that "the force required to cause the deformation of the right wheel would be sufficient to fracture the critical stud". (Appellant's Brief, p. 2)

Mr. Radar was allegedly going to testify as to a lab experiment where he attempted to measure the force necessary to dent the wheel rim. He allegedly would have testified that it takes 48,000 pounds psi to fracture a sound Pitman stud. He then took a wheel rim and produced a dent similar to the one observed on the Weiss vehicle. Through the application of psi, the force required to produce the dent allegedly resulted in the transmission of only 13,333 pounds per square inch of force upon the Pitman stud. Thus, Mr. Radar concluded that the Pitman stud could not have been fractured as the result of the right wheel's impact with the flange.

The Trial Court refused to allow this testimony on rebuttal because (1) it concerned an issue which was first raised on plaintiff's direct case, (2) it should have

been put in originally in her case in chief, and (3) it did not speak to any new facts raised by Chrysler's defense.

As previously discussed herein, two of plaintiff's experts testified that the vehicle's right wheel collision with the stump could have induced an impact fracture. In fact, Mr. Mosely so stated in the State Court litigation more than three years prior to the trial of the instant action. He also testified during the prior trial that it would take 50,000 pounds per square inch of force to fracture a Pitman stud, although he denied having such knowledge during cross-examination on this case. Additionally, plaintiff had full knowledge of Chrysler's defense to this action from its defense in the prior litigation and through discovery in the instant one.

More importantly, Mr. Radar's rim experiment results also do not serve to rebut any viewpoints raised by Mr. Mazur. When Mr. Mazur testified that it would take 4,560 pounds of force to fail a Pitman stud, he was not using the same type of force measurement as Radar used.

Mr. Mazur was referring to foot pounds while Radar used pounds of pressure per square inch of force.

Plaintiff was thus attempting to introduce evidence on rebuttal which could not contradict Mr. Mazur's testimony because of the use of different measuring standards.

Appellant's counsel has either not read Mr. Mazur's testimony or has deliberately misstated the thrust of Mazur's theory in a desperate effort to raise the presence of reversible error.

Mazur established that it required almost twice as much force to pull out the tie rod stud as is required to fracture the Pitman arm stud. Since plaintiff's expert conceded that the tie rod separation occurred upon impact with the tree stump, the force transmitted through this collision had to be sufficient to induce the fracture.

It is submitted that the "cruciality" of Radar's experiment dissipates upon an accurate analysis of Mazur's testimony. The right wheel flange damage established the place of entry of the gigantic forces conceded by all, but it was the separated left tie rod stud which conclusively proved the defense case. It was undoubtedly for this reason that Radar astutely failed at any time to perform a tie rod stud pull out test for purposes of rebuttal.

POINT I

PLAINTIFF'S CONTENTION THAT SHE
RECEIVED NO ADVANCE NOTICE OF
CHRYSLER'S DEFENSE IS A SPECIOUS
CLAIM DESIGNED TO DELIBERATELY
MISLEAD THIS COURT

Plaintiff has misleadingly, although skillfully, attempted to portray herself as the unwitting victim of defendant's deliberate concealment of defense and as the beleaguered and undeserving loser of valiant, hard fought battles with the Trial Court. Fortunately, the record in the case at bar betrays the inaccuracy of her attempts.

In fact, during the course of a conference between counsel and the Trial Justice wherein plaintiff's counsel was advised by the Court that he was not "zeroing" in on Mr. Mazur during cross-examination, and was thus losing the attention of the jury, to which plaintiff's counsel responded that defense counsel was permitted to conduct lengthy cross-examinations of plaintiff's witnesses, the Court made the following accurate observation:

"I guess I have disagreed with practically everything that Mr. Schwab has asked me to do, but his cross was right on target consistently." (pp. 842-844)

Defendants do not wish to burden this Court with a complete recital of the Trial Justice's rulings which were adverse to the interests of defendants, but

offers below a few examples to demonstrate that if prejudicial error was committed in the case it appears defendants were the objects of same.

Plaintiff, Lillian Weiss, was the operator of a vehicle which was involved in a collision fatal to her brother, David Weiss. Under these circumstances, it was completely natural and humane for her to seek an explanation for this accident other than that of her own negligence. The trial court permitted testimony by plaintiff that while in the Emergency Room she told her doctor and then her sisters that the accident was not her fault, that the steering failed and she also claimed to have instructed them not to allow anyone to touch her vehicle. The court refused defendants' counsel's motion to strike, despite the fact that these statements were not spontaneous declarations since plaintiff also testified that she was conscious at the accident scene and was able to repeat statements and observations made thereat (pp 61-65, 125-126).

The court also refused to permit defendants to read a deposition and prior court testimony of passengers in the Weiss vehicle although the prior litigation arose out of the same occurrence, the issues were substantially the same and both Miss Weiss and Chrysler were defendants in the prior litigation accorded full and complete rights to cross examine these witnesses. The court instructed counsel for defendants that he must either elect to produce these witnesses at trial or be precluded from

offering such proof. (pp. 866-867)

At great effort, Chrysler was fortunately able to obtain the appearance of Mr. Maraniss from Florida and Miss Hillary from Jamaica who testified so strongly about the driver negligence of their ex-friend and employer, Lillian Weiss.

As previously stated, the record is filled with other examples of rulings which were adverse to defendants and which seriously hampered presentation of their defense. In spite of the foregoing, however, the overwhelming weight of the credible evidence mandated a verdict for the defendants.

This Court's attention is respectfully referred to Point I of Appellant's Brief wherein she self-righteously criticizes defendants for not calling upon Mr. Gregory to testify. (Appellant's Brief p. 20) When, as is apparent from plaintiff's reading of Mr. Gregory's deposition into the record, Mr. Gregory had no opinion one way or another as to the causes of the successive fractures.

Mr. Gregory, a metallurgist, was hampered in rendering any interpretation as to the cause of the fractures by reason of his lack of expertise in electron microscopy. Accordingly, Mr. Gregory declined to merely "parrot" the opinions of Turnbull, which would have apparently satisfied plaintiff, but instead indicated he did not have an opinion although he had drawn certain

conclusions about which he testified. Further, appellant's brief cleverly refers to the stud (actually only a portion) being subject to testing by Chrysler for two weeks and yet Gregory was not called, whereas Turnbull who examined for only one day did testify. The inference that the few non-destructive metallurgical tests permitted to be performed by Chrysler under the State Court order required two weeks of effort is in error, and Mr. Turnbull was called to testify, not as a hired technician, but in his capacity as the general manager of Ernest F. Fullam Inc. and probably the leading electron microscopist in the United States.

Plaintiff proceeds to inaccurately allege that Mr. Gregory found that the "part was running cracked" when Mr. Gregory testified that this statement was included in notes he made of comments by Mr. Turnbull. (Appellant's Brief p. 21).

Plaintiff continues by attacking Mr. Mazur's testimony on the grounds that he never studied the actual fractured pieces of the steering assembly. With the exception of one piece of the fracture surface, defendants were never given an opportunity to study these parts, because the plaintiff through her attorneys and representatives first permitted the automobile to be junked, next permitted all of the steering linkages to be thrown out in garbage removal from a garage which would have included a part of the Pitman stud, and finally, after examination by Gregory and Turnbull, lost the balance of the stud. The fact that Mazur was not shown the portion of the stud is neither surprising nor representative of devious doings by Chrysler since examinations by a metallurgist, Gregory, and

an electron microscopist, Turnbull, were what was required.

In addition, it should be noted that plaintiff's expert, Mr. Mosely, produced a tire at trial which he claimed to have removed from the Weiss vehicle. At no time during the course of this litigation was there even a hint from plaintiff's counsel that this tire existed or available for study by defendant's experts. We submit that Mr. Mosely's failure to mention his retention of the tire during State Court litigation is a significant indication of the falseness of plaintiff's assertions on this appeal.

Plaintiff also condemns defendants for producing Mr. Mazur to testify about a test which he did not personally conduct. (Appellant's Brief, p. 32). Of course, she omits from her brief that defense counsel offered to bring in a Mr. Parrott who actually performed the test. Plaintiff's counsel was to accept defendant's offer by the close of the trial day. He ignored the time limitation, imposed with the approval of the Court, and requested the production of Mr. Parrott at the end of the following day. Chrysler, however, graciously complied with plaintiff's request and produced Mr. Donal Parrott on its direct case with regard to the specific laboratory tests performed during the trial under the supervision of Mr. Mazur. Plaintiff, of course, omits mention of Mr. Parrott's testimony in her brief.

Additionally, as the Trial Court pointed out to counsel, Dr. Gordon was permitted to testify as to studies

and examinations which were not personally performed by him but merely under his supervision.

Plaintiff contends herein that the Court below committed prejudicial error by refusing to preclude defendant from proving through Mazur that the first stage of fracture was caused by impact "in view of Chrysler's non-revealing interrogatory answers. . .". (Appellant's Brief, p. 32).

Defendant's answers to plaintiff's interrogatories are no more general or less specific than plaintiff's answers to defendant's interrogatories. Plaintiff in response to defendant's interrogatories states:

"That the accident was caused by a defective bolt connecting the Pitman arm to the steering linkage and that such defect existed prior to the accident".

Defendant on the other hand consistently alleged in his answers that the loss of control of this vehicle was occasioned by driving error and that the failure of the Pitman arm stud was induced by impact load resulting from the happening of the accident. Furthermore, defendants alleged that Mr. Stewart would testify that the failure of the stud was due to impact with the tree at the time of the accident. We submit that these answers in no way contradicted defendant's proof at trial, nor did the proof go beyond their confines for defendant's experts testified at trial that the Pitman arm fractured in two stages which were induced by impact loads after plaintiff's

loss of control over the operation of her vehicle caused the vehicle to run off the roadway due to speeding under certain road conditions. Plaintiff's argument notwithstanding, at no time did Chrysler specifically adopt a theory as to which one of the impacts or combination of impacts caused the successive fractures of the stud.

Following the service of defendant's answers to plaintiff's interrogatories, plaintiff, by motion, sought leave to examine defendant's experts. This Court is respectfully requested to note the following statements made by plaintiff's counsel in his affidavit in support of said motion which clearly contradict plaintiff's contentions of prejudice on this appeal:

"6. Interrogatories have been put and answered by both parties. It is plain from the answers that each side has a battery of experts who are prepared to testify that at direct loggerheads one with the other. Plaintiff's experts contend that the metallurgic and engineering study of the defect in the metal and material, that as a result of this defect the steering mechanism suddenly failed and it was this failure that caused and initiated the car leaving the road and the happening of the accident."

"7. Defendant's experts are obviously prepared to testify that whatever fracture or defect was found in the Pitman arm stud was due to and was the result of the accident, and in no way caused a steering failure or the happening of the accident."

"8. . .As will be demonstrated below, the responses that have been received are, perhaps necessarily and because of the limited capacities of the interrogatory process, superficial and woefully insufficient to permit the plaintiff to prepare for cross-examination of defendant's experts. . .".

"14. . . We believe it is obvious from a perusal of the defendant's answers that the Pitman arm was turned over for study by defendant's experts. Defendant's experts studied it with electron microscopes, special photographs and otherwise. However, Chrysler's answers to Interrogatories disclosed only a superficial aspect of that study."

"15. Clearly the Interrogatory procedure is insufficient or inappropriate for this highly technical purpose and area, and a question and answer, deposition process will be far more useful and efficient to achieve balanced and appropriate pre-trial disclosure, and expedite the actual conduct of the ultimate trial. . .".

As the result of plaintiff's foregoing statements to the Court below where she asserted tha the interrogatory process is an insufficient and inadequate procedure to obtain the information needed for preparation of her case, the Court directed the deposition of all of defendant's experts. Significantly, plaintiff did not move against defendant's answers but accepted them and sought other forms of discovery, nor did she complain of Chrysler's wrong doing or concealment.

In February 1972 the Court below ordered defendants to submit all of their experts for depositions which were to be completed within 30 days. Plaintiff's counsel ignored the Court's directions and failed to pursue discovery. In September 1972, the Court then called a conference where plaintiff's counsel again expressed its desire to depose all of defendant's experts. The Court very generously directed that plaintiff could depose Mr. Turnbull despite plaintiff's lack of diligence in complying with the prior discovery order. Thereafter, plaintiff notified defendant's counsel that they wanted to depose Mr. Gregory instead of Mr. Turnbull.

Once she obtained the additional discovery, she again decided to use the interrogatory process by the service of supplemental interrogatories to obtain additional information relating solely to Chrysler's contentions as to the effect, if any, of the August 3, 1964 collision between the Weiss and Elfers' vehicle. Defendants response stated that they made no contention with respect to the Elfers' accident and submitted that it was plaintiff who contended that this prior accident may have been a factor in the accident of November 14, 1964.

Upon receipt of Chrysler's answers in this regard, plaintiff moved, on the eve of trial, to strike defendant's answer for their wilful failure to provide answers to these interrogatories relating to the Elfers' accident, whereupon defense counsel advised the Court during conference that we did not know what effect, if any, the Elfers' collision had in precipitating the accident of November 14, 1964. The cases are clear that if a party does not have sufficient information to answer an interrogatory, he may so state and not be penalized for such inability. United States v. Imperial Chemical Industries Inc., 8 F.R.D. 551, 553 (S.D.N.Y. 1949). The Court agreed that it could not compel defendants to provide information which they did not have (p. 25).

During the conference, the only request for preclusion made by plaintiff's representative was with respect to those interrogatories concerning the Elfers' accident. Plaintiff erroneously argued that defendants had admitted through its deposition of Mr. Gregory that the stud had been fractured prior to the November 14, 1964 accident. Plaintiff's counsel made

the following statement to the Court:

"I can't believe that they are going to come with no information and no facts on prior fractures. It is clear that their experts have analyzed it in this regard. They know there were prior fractures; there is no question about it. Perhaps a question to be resolved is whether there was prior impact or prior fatigue, but this is central to the case. Now we know that Chrysler knows that this piece was fractured before the accident." (p. 10)

Clearly, defendants have never contended either in its answers to interrogatories or through deposition that either stage of fracture occurred prior to the accident.

The Court, in replying to plaintiff's argument, suggested that maybe defendants should be precluded from offering any evidence on trial as to the fractures". (p. 11) Clearly, the Court was referring to proof of fractures occurring prior to the November 14, 1964 accident. Plaintiff thereafter twice indicated that her only real concern was with preclusion of proof regarding the Elfers' accident (pp. 11, 12).

It should be noted that plaintiff never complained of defendant's answer to interrogatory #46. The Court questioned Mr. Lewis, defendant's representative, about any other impact which Chrysler might rely on. Defendant's representative stated at the beginning of the conference, that he was appearing in place of another attorney (Mr. Schwab - actual trial counsel) who was engaged on trial and was, therefore, virtually totally unfamiliar with the instant action (pp. 11-12). Plaintiff's attorney then requested the Court to advise defendants that interrogatory #46 was continuing. Accordingly, the Court directed defendants to amend their answers, if any, of their experts reached different

conclusion or acquired additional information prior to trial. Since plaintiff had the benefit of having recently taken the deposition of Mr. Gregory, no amendment of defendants; answers would be necessary with respect to him (pp. 32-34).

Appellant in her brief strongly suggests that her interrogatories, and in particular Interrogatory #46, call for all tests wherever performed which would have included some of the general tests performed by TRW Inc. during the course of its regular business operations and tests during the actual trial. Such is not the case once again. Interrogatory #46 calls for various types of specific details as regards tests performed and identified in answer to Interrogatory #45. Interrogatory #45 asks:

"Following the alleged failure of the steering and the stud on the occasion in question on November 14, 1964, were any tests, examinations or inspections made by the defendants or in defendants' behalf, in an attempt to determine the cause of the failure." (emphasis supplied)

Chrysler properly responded with information apparently satisfactory to the plaintiff about the tests by Gregory and Turnbull. These were the only tests, examinations or inspections which were in any way responsive to the interrogatory and this remained true until the trial of this action when the continuing requirements of the interrogatory ceased to be effective.

The test conducted at the directions and under the supervision of Sylvester Mazur was performed on February 24, 1973, four days after the commencement of trial. (p. 858).

It is respectfully submitted that since these test results were acquired following the commencement of trial, no amendment of defendants' answer to Interrogatory #46 was required. Thus, there was no violation either intentionally or unintentionally of the Court directive.

At no time did plaintiff ever complain in any motion to the Court below that defendants' answers to her other interrogatories were insufficient.

Furthermore, while plaintiff now claims that on trial she moved to strike all of Mr. Mazur's testimony regarding TRW's performance of a stress test on the grounds that she did not receive notice of such a test in defendants' answers to her interrogatories, the record does not support her claim. At trial, counsel made the following motion to strike:

"Mr. Mazur has testified on direct about a nineteen thousand cycle test . . .".

"We were never served with any kind of updated information as to them conducting tests. But, without reaching that necessarily as to the pre-trial discovery aspect, its plain hearsay from this man and is totally inadmissible. (p. 865)

Moreover, plaintiff's assertion that she had no notice of the defense in this action is groundless. The following portions of defense counsel's opening statement to the jury conclusively demonstrates the falsity of plaintiff's assertions:

". . .his conclusion was that this was a sound piece of metal and that this fractured as a result of what is known as the load impact, a force being applied to it, not by driving over a road --if you will, the conclusion that this cracked after the car went off the road".

"Mr. Stuart's conclusion was that this bolt fractured following the vehicle going off the road because of what is known as load impact; tremendous force being applied to the vehicle."

". . .we will show you now not only that the cause of the accident was, if you will, the operation of the vehicle by Miss Weiss but that the reason that the bolt broke was what happened when the vehicle went off the road."

"In that 69 feet on the embankment on something of a tilt at times, apparently the vehicle hit initially a tree stump, which dragged the underneath portion of the car. The vehicle then went over a drainage ditch which the police estimate, and you will see photographs of it, being approximately two feet deep and four feet wide."

"Then, the end of the story was the impact of this vehicle against a tree approximately two feet in diameter with essentially the entire front going into it, a little bit more on the right hand side so that the entire front is caved in".

"Now, we say to you that we will prove to you that damage to that Pitman stud occurred due to the forces being generated during the 69 feet of disaster that took place. . .".

It is further submitted that the testimony of plaintiff's experts, Alfred Mosely and Stephen Richard, also conclusively negate any claim of surprise made by plaintiff herein. The Court is respectfully referred to the Counter-Statement of Facts included in this brief wherein plaintiff's counsel's statements, actions and conduct belie his belated cries of surprise.

Most importantly, when the Trial Court instructively criticized plaintiff's attorney's cross-examination of Mr. Mazur as cited in the beginning of this point, plaintiff's counsel did not respond that he was unprepared by reason of the fact that he had no notice of what Mr. Mazur was going to say. He did not claim surprise and prejudice to his client. (pp. 842-844). He assuredly responded to the Court as follows:

"I don't pretend that Mazur's cross-examination is going to be over in fifteen minutes. It will not be, and for very good reasons. After I am through Mr. Mazur, the rest of the witnesses will come in, I may not even stand up to cross-examine them. Your honor will see why when I am through with Mazur". (p. 844)

We submit counsel for plaintiff did not complain about Mr. Mazur's testimony because he in fact had anticipated it and thought that through cross-examination he could destroy Mazur's testimony before the jury. Having failed in his attempts, he is precluded from feigning surprise and claiming prejudice on this appeal. Adkins v. Ford Motor Co., 446 F.2d 1105 (6th Cir. 1971).

POINT IITHE TRIAL COURT'S REFUSAL TO ALLOW
PROOF OF RADAR'S RIM EXPERIMENT ON
REBUTTAL WAS A PROPER EXERCISE OF
ITS DISCRETION

We submit that the Trial Justice was correct in rejecting testimony offered in rebuttal that should have been offered in chief. Jones on Evidence, 3rd Edition, Section. 809.

Radar's proposed testimony would have allegedly concerned the amount of force necessary to produce deformation of the wheel rim (Appellant's Brief, p.2). Plaintiff erroneously argues that such testimony constituted proper rebuttal because of Chrysler's concealment of its stump impact theory until the testimony of Mazur on defendants' direct case. Plaintiff further contends that Radar's testimony would have contradicted Mazur's theory that the force which deformed the right wheel flange was sufficient to have fractured the Pitman stud (Appellant's Brief, p.3).

Appellant's counsel misstates Mazur's theory in the same manner as they feign surprise. For the sake of brevity in this rather lengthy brief necessitated by the inaccurate and misleading distortions of the trial record included in Appellant's Brief, we will not repeat all of the proof which destroys plaintiff's claim of concealment. This Court is respectfully referred to the Counter-Statement of Facts and Point I of this brief.

Plaintiff had an obligation on her case in chief to offer proof negating other possible causes for the Pitman stud fracture. Schwartz v. Macrose Lumber & Trim Co., 29 A.D. 2d 781, 287 N.Y.S. 2d 706, aff'd. 24 N.Y. 2d 856, 301 N.Y.S. 2d 91 (1969; Ingersoll vs. Liberty Bank of Buffalo, 278 N.Y. 1 (1959)).

It is to be noted that the basis for the Trial Court's dismissal of the complaint and cross-complaint against Chrysler in the prior actions was the failure of proof of product defect. Specifically, the Court held"

"So while you don't have to prove anything to an absolute certainty you have got to prove at least enough so as to remove the cause of the accident from the realm of speculation, and as a finder of facts I am not going to sit here and speculate which of the three possible causes of the original crack was responsible for the beginning of the complete severance of this bolt".

Appellant's brief suggests that plaintiff was required to introduce only minimal proof in her case in chief to establish the existence of a manufacturing defect. Such is not the case. Certainly under the facts of this case and an accident involving a four year old automobile which had been driven approximately 32,000 miles and with regard to which, the proof established no other complaint regarding a defective Pitman stud in over approximately 800,000 vehicles utilized the same design and manufactured stud. Plaintiff had a substantial burden in her case in chief to exclude other possible causes for the happening

of the accident which includes of necessity proof to exclude other reasons for the fracture of the stud. This was an obligation to be met in her case in chief and not in rebuttal. It is submitted most respectfully that assuming *arguendo* Radar's alleged test had been presented in plaintiff's case in chief, nevertheless the plaintiff would have failed to have made out a *prima facie* case.

We further submit that if Radar had been called on plaintiff's case in chief to testify with regard to the test on the wheel flange not the separation of the tie rod and if a jury had returned a verdict in favor of plaintiff, the Court, nevertheless, would have been compelled on motion to set aside the verdict in favor of plaintiff. Notwithstanding the sophisticated testimony by one expert after another in this case, the simple fact of the matter is that this accident occurred because of the excessive speed of Lillian Weiss trying to make up for lost time, and the fear expressed by the occupants of the automobile in requesting plaintiff to slow down were indeded proven to be well-founded.

We submit that plaintiff made a weak effort to negate these other possible causes on her case in chief, which belies her claim of surprise. We further submit that while Radar's experimient may have been competent evidence on her affirmative case for purposes of repairing the rather damaging testimony of her own experts, it does not constitute proper rebuttal evidence.

The prevailing rule is that on rebuttal an adversary may only be heard adducing proof directly rebutting the proofs

given by his adversary. Wigmore on Evidence, Sec.1873.

At no point does appellant contend that Radar's experiment in any way shows the relationship between the amount of force required to fracture a stud and the amount of force required to cause the tie rod separation.

Additionally, Radar uses a different standard of measurement, to wit, pounds of pressure per square inch (psi) whereas pounds (lbs.) was the measurement used by Mazur during his testimony. Clearly, the proposed testimony of Radar could not have served to rebut Mazur's testimony since two totally different types of measurement were used.

Interestingly, it would appear that Radar's measurement was based upon theoretical computation whereas Mazur's was based upon actual tests conducted during the regular course of TRW's business.

We have accepted only for the sake of argument the substance of Radar's proposed testimony as set forth in appellant's brief (p.3). It is to be noted that plaintiff's counsel failed to make an offer of proof concerning the Radar experiment. Thus Chrysler is unable to offer further argument in support of the Court's exclusion of Radar's testimony by reason of plaintiff's failure to make an offer of proof on the record. We contend that the failure to make such an offer as is evident by the record transmitted to this Court should preclude review of plaintiff's claim of reversible error.

Such an omission is fatal on an appeal of this nature.

In view of the inaccuracies and misstatements contained in appellant's brief with respect to other matters, appellees strenuously object to this Court's review of the exclusion of Radar's rebuttal evidence.

To permit evidence of an entirely new experiment during rebuttal, after more than three weeks of trial, would have been improper because (1) the evidence should have been put in on plaintiff's direct case since it concerned issues raised therein and (2) it did not serve to directly contradict or overcome any new points raised in defendants' case in chief.

The customary rule forbids evidence of new facts which ought to have been put in before or a repetition of former facts already evidenced. Friend v. Commissioner Of Internal Revenue, 102 F.2d 153 (7th Cir. 1939); United States v. Puttyman, 142 F. 2d 891 (4th Cir. 1944).

In the case at bar, plaintiff sought to introduce evidence which did not serve to rebut Mazur's testimony, contrary to her assertions on this appeal. As is more fully explained in Appelles' Counter Statement of Facts, Mazur's impact theory was based upon the fact that a greater force is necessary to cause a tie rod separation than is necessary to fracture the Pitman stud. The amount of force necessary to cause the deformation of the wheel flange, the subject of Radar's experiment, is irrelevant, especially where plaintiff's experts agree that upon the vehicle's impact with the stump, the tie rod separation occurred.

Also, the introduction of such evidence would have led to surrebuttal by defendants, causing the trial of this action to go on and on.

We submit that the Trial Court's decision to limit rebuttal to evidence which directly refuted points specifically raised in the defense was proper. Indeed, to have permitted testimony concerning the Radar experiment at such a late date would have been extremely prejudicial to Chrysler. This Court is respectfully requested to note however, that while the Court refused admission of this testimony, it, nevertheless, permitted plaintiff full and fair opportunity to present other rebuttal evidence through alleged experts, Radar, O'Connell, Gordon and Wilder.

POINT III

THE TRIAL COURT'S REFUSAL TO PERMIT THE USE OF
GREGORY'S DEPOSITION TO CROSS EXAMINE ANOTHER
OF DEFENDANTS' EXPERTS WAS PROPER SINCE GREGORY
WAS NOT A MANAGING AGENT FOR CHRYSLER

Rule 26 of the Federal Rules of Civil Procedure provides that parties are required to attend depositions on notice from an adverse party. Corporations, such as the defendants herein, must produce either an officer or managing agent upon receipt of such a notice, provided the notice is sufficiently specific to identify the person to be examined. Williams v. Lehigh Valley R.R., 19 F.R.D. 285 (S.D.N.Y.1956). Indeed, depositions of a corporate party may be taken only through one of its directors or managing agents pursuant to notice. Klop v. United Fruit Company, 18 F.R.D. 310 S.D.N.Y. 1955).

In the case at bar, defendants produced Donald Gregory, a metallurgist employed by the Chrysler Corporation, pursuant to the order of the Court below upon plaintiff's motion for leave to conduct depositions of all of defendants' experts.

On February 8, 1972, plaintiff sought an order pursuant to F.R.C.P. 26(b)(4)(ii), "authorizing the taking of the depositions of defendants' engineering and metallurgical experts, Messrs. Thomas B. Turnbull, Donald Gregory, Morris Hassan, and Isaac Stewart." (Plaintiff's Notice of Motion, dated January 24, 1972).

Defendant Chrysler Corporation was ordered to produce only one of its experts, Thomas Turnbull. Plaintiff then indicated a desire to examine Donald Gregory, instead. Defendants complied and produced him for deposition.

If Mr. Gregory was in fact managing agent for the Chrysler Corporation as is contended by plaintiff on this appeal, leave of Court would not have

been necessary. Plaintiff's actions in seeking such leave and the statements contained in her Notice of Motion constitute an admission that Mr Gregory was neither an officer nor a managing agent of the defendant corporation.

Furthermore, at the deposition of Mr. Gregory, plaintiff's counsel made the following statement on the record which contradicted the position taken by plaintiff on this appeal:

"Well, if your please, Mr. Schwab, I believe Mr. Gregory is presented by the Chrysler Corporation as an expert in metallurgy..." (p.181).

Accordingly, plaintiff's claim that Mr. Gregory was a managing agent for Chrysler Corporation, entitling her to use his deposition for any purpose at trial, including upon the cross examination of defendants' experts, contradicts her actions and statement prior to trial.

Thus, plaintiff's complaint that she was prejudiced by reason of the Trial Court's wrongful refusal to permit the use of Gregory's deposition during the cross examination of defendants' expert, Turnbull is clearly erroneous.

It is to be noted that plaintiff merely asserts that Mr. Gregory was the managing agent for the Chrysler Corporation at the time of his deposition. She fails to offer any substantive proof that he was anything other than a metallurgist employed by the Chrysler Corporation (See Appellant's Brief, p.66).

It is further submitted that plaintiff's assertion that, pursuant to F.R.C.P.26 (d) (3), she should have been permitted to use Gregory's deposition for any purpose because Mr. Gregory was located more than 100

miles from the Court at the time of trial is an issue belatedly raised for the first time on this appeal. A review of the trial record reveals that plaintiff failed to make this assertion in the Court below, therefore precluding review of this issue on appeal.

In addition, assuming arguendo that the plaintiff was entitled to use Gregory's deposition for any purpose, it is clear that the preclusions of such use by the Trial Court was inconsequential since (1) plaintiff was permitted to cross examine Mr. Turnbull using notes made by Mr. Gregory during a joint conference and (2) plaintiff read Mr. Gregory's entire deposition to the jury.

Mr. Gregory explained at this deposition that he jotted these notes down while Mr. Turnbull looked at the stud under an ordinary microscope. He told Mr. Turnbull to say whatever came into his head and he would jot down his comments as best he could (p.118).

To support her claim of prejudice, plaintiff cites the following statement included in Mr. Gregory's notes:

"Part was running cracked."

Mr. Gregory explained that none of these notes were ever explained to him by Mr. Turnbull. At his deposition, he guessed Mr. Turnbull might have seen what he thought was a rounded edge (pp.119-120). It is to be noted that Mr. Gregory also testified that he did not notice any rounded edge upon his examination of the stud (p.120).

Despite the fact that Mr. Turnbull had never seen Mr. Gregory's notes prior to trial, plaintiff's counsel was permitted to examine his as to the statement included in those notes. Mr. Turnbull swore that he did not make the statement cited above and suggested that he probably said that if the part was running cracked then they should find certain evidence of same such as the presence of a rounded edge (p.105).

It is clear from the foregoing that the plaintiff was permitted to

not only raise, but fully explore, before the jury any inconsistency between Mr. Turnbull's trial testimony and his findings and conclusions as set forth in Mr. Gregory's notes.

It is also apparent that the jury had a complete opportunity to compare Mr. Turnbull's findings with those of Mr. Gregory based on plaintiff's reading of the entire Gregory deposition.

We submit, however, that Turnbull's findings did not in reality conflict with those of Mr. Gregory who testified that he had no opinion as to whether the entire stud fractured in fatigue or impact. (Appellant's Brief, pp.6465; 135).

This Court is respectfully requested to note that the Court below also refused to allow defendants to use depositions of the passengers in the Weiss vehicle previously taken in State Court litigation arising out of the same occurrence, although the parties to the instant litigation were also parties to the State Court actions, the issues in both were substantially the same, and there was full and complete opportunity for cross examination. Hertz v. Graham, 23 F.R.D. 17 (S.D.N.Y.1958); Scotti v. National Airlines, Inc., 15 F.R.D. 502 (S.D.N.Y.1954). Defendants were required to produce these parties at trial.

We further submit, however, that the Trial Court's failure to allow plaintiff's counsel to use Gregory's deposition during cross examination of Mr. Turnbull was not only proper but non-prejudicial. Additionally, the issue of the Gregory deposition cannot properly be raised at this late juncture since appellant has failed to cite this issue in its notice served pursuant to the Federal Rules of Appellate Procedure.

CONCLUSION

There is no merit to this appeal in fact or in law and the unfortunate resort by appellant to less than subtle distortions and misstatements of the record confirm that this is indeed the case. The jury unanimously decided questions of fact adverse to the appellant. A close personal friend of the appellant, Herman Maraniss, and the ex-maid of the plaintiff, Modesta Hillary, both testified in substance that plaintiff has been operating at an extremely excessive rate of speed. Indeed, she had covered sixty miles, part of which was through traffic, in the space of one hour.

Miss Hillary gave the following description of Lillian Weiss' operation of her vehicle on the day of the accident:

"Lillian Weiss was driving very fast on the highway, and on one point Mr. Maraniss called to her and told her she should slow down a bit, but she continued to speed.

So Mr. Maraniss suggested that we have lunch by the way at the Club, but Mr. Weiss did not agree, so she continually speed, and when we get to the 123 Route and New Canaan Road, she continued that speed, and the car, when we got to where the accident occurred, she swung to the right, she was too much to the right.

Mr. Weiss said to her, 'And what do you think you are doing?'.

Then she tried to steer to the left and back to the right, and we hit the tree".
(pp. 448-449)

We submit the judgment entered upon the jury's verdict in favor of Chrysler must be affirmed.

Respectfully submitted,

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Of Counsel

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

-----X
LILLIAN WEISS,

Plaintiff-Appellant,

-against-

CHRYSLER MOTORS CORPORATION
and CHRYSLER CORPORATION,

Defendant-Appellees.
-----X

AFFIDAVIT OF SERVICE

73- 2201

STATE OF NEW YORK

COUNTY OF NEW YORK

ANN deCARADEAU BARTHOLOMEW, being duly sworn, deposes and
says:

I am not a party to this action and am over 18 years of
age.

I reside in New York City.

On the 25th day of November, 1974, deponent served the
within Appellees' Brief upon ARUM, FRIEDMAN & KATZ, ESQS.,
attorneys for plaintiff-appellant LILLIAN WEISS in the above
entitled action, by delivering three copies thereof to
FRED PROFETA, ESQ. personally.

Sworn to before me this

28th day of November, 1974

Pamela Anagnos Lapaki

Ann de Caradeau Bartholmeu
ANN de CARADEAU BARTHOLMEW

PAMELA ANAGNOS LAPAKI
Notary Public, State of New York
No. 24-2352164
Qualified in Kings County
Commission Expires March 30, 1975